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No. 88-864 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH STOUT and BARBARA STOUT,
Petitioners,

v.

A.M. SUNRISE CONSTRUCTION COMPANY, INC., and COLE & ASSOCIATES, INC.,
Respondents.

BRIEF OF A.M. SUNRISE CONSTRUCTION COMPANY, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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21 pp

QUESTIONS PRESENTED

1. Why should the Supreme Court of the United States entertain a Petition for a Writ of Certiorari where the issues presented are not novel, but have in fact been decided in numerous decisions of the Supreme Court of the United States?
2. Why should a Petition for a Writ of Certiorari be granted, where the plaintiffs' claims against three separate defendants were dismissed, *seriatim*, for repeated and gross non-compliance with discovery orders of a trial court?
3. Why should a Petition for a Writ of Certiorari be granted where all of the claims presented to this Court as excuses for violation of discovery orders were determined to be *immaterial* by the trial court, the Court of Appeals of Indiana, and the Supreme Court of Indiana?

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A.M. Sunrise Construction Company, Inc. (hereafter A.M. Sunrise) respectfully opposes the plaintiffs' Petition for a Writ of Certiorari on the grounds that dismissal of the Complaint against A.M. Sunrise was the third time the sanction of dismissal was imposed upon the plaintiffs, for failure to comply with discovery rules and orders. The standard on review is whether or not the trial court abused its discretion in imposing the sanction of dismissal.

This issue has been reviewed by the Court of Appeals of Indiana, which found that the trial court did not abuse its discretion. The matter was presented *de novo* to the Supreme Court of Indiana, which refused to overrule the Court of Appeals.

Where a sanction has been imposed pursuant to valid statute or rule, no violation of the due process

requirements of the Fourteenth Amendment have occurred.

INDIANA STATUTE AUTHORIZING SANCTIONS

The Indiana Rules of Court, Trial Rule 37(B)(2) provides as follows:

> If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> . . . .
>
> (c) An order . . . dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; . . .

STATEMENT OF THE CASE

On October 3, 1977 Joseph Stout was injured on a construction project. On October 3, 1979 he filed suit against Central Rent-A-Crane, Cole & Associates, A.M. Sunrise Construction Company, Inc., and Biblich Elementary School. A.M. Sunrise subsequently joined C&C Iron as a third-party defendant.

On October 6, 1979, Central Rent-A-Crane propounded Interrogatories to the plaintiffs; on December 6, 1979 Central Rent-A-Crane propounded a Motion for Production of Documents to the plaintiffs. On April 29, 1980, the plaintiffs answered Central Rent-A-Crane's Interrogatories, but did not respond to Central Rent-A-Crane's Motion for Production until

January 26, 1981. In April, 1982, Central Rent-A-Crane filed a Motion to Compel Discovery against the plaintiffs, and on June 11, 1982, filed a Motion for Summary Ruling on a Motion for Sanctions. On September 29, 1982, the Court ordered the plaintiffs to respond to Central Rent-A-Crane's Interrogatories without objections, or to suffer dismissal with prejudice. The plaintiffs having failed to comply with that Order, on October 21, 1982, the Court dismissed the plaintiffs' Complaint against Central Rent-A-Crane for non-compliance with discovery orders. The plaintiffs resisted that Motion, filing their Motion to Reinstate the Claim on November 3, 1982; that Motion was subsequently withdrawn on March 7, 1984. *The dismissal of the Complaint against Central Rent-A-Crane represented the first time that sanctions were imposed against the plaintiffs for non-compliance with discovery orders.*

In May of 1982, Cole & Associates filed Interrogatories to the plaintiff. On September 20, 1982 Cole & Associates filed a Motion to Compel Discovery against the plaintiffs. On May 22, 1984 Cole & Associates filed a Motion for Sanctions on account of the plaintiffs' failure to respond to Interrogatories filed in May of 1982. The Court ordered the plaintiffs to answer the Interrogatories by June 13, 1984 or to suffer sanctions. On June 11, 1984 the plaintiffs moved for an extension of twenty (20) days to respond to these Interrogatories. The plaintiff did not comply with the extension deadline, but did file answers to the Interrogatories on August 8, 1984; answers were evasive or non-responsive. On August 15, 1984 Cole & Associates filed additional Interrogatories to the plaintiffs, to which the Court ordered answers within

thirty (30) days. On September 11, 1984 the plaintiffs requested thirty (30) additional days to respond to Cole's Interrogatories. On December 14, 1984 Cole & Associates filed a Motion to Compel answers to the Interrogatories, and the Court ordered the plaintiffs to answer within fifteen (15) days or suffer sanctions by the Court. On January 8, 1985 the plaintiffs filed non-responsive answers to Cole's Interrogatories. On January 15, 1985 Cole & Associates filed another Motion to Compel the plaintiffs to respond to the Interrogatories. On February 6, 1985 the plaintiffs requested an extension of time to respond to Interrogatories propounded by Cole & Associates. On February 21, 1985 the Court ordered the plaintiffs to respond to Cole's Interrogatories more specifically on or before March 4, 1985 or to suffer dismissal with prejudice without further hearing. On March 1, 1985 the plaintiffs filed a Request for Extension of Time to respond to those Interrogatories. The Court granted the plaintiffs until March 18, 1985 to answer the Interrogatories, and stated that no further extensions of time would be granted. On March 19, 1985 hearing was held on Cole & Associates' Motion for Sanctions and Motion to Dismiss. The Court found that the plaintiffs' conduct had threatened to or had so delayed the right of Cole & Associates to prepare a defense that the only adequate relief would be dismissal with prejudice. *This represented the second time the plaintiffs' case against a defendant was dismissed as a sanction.*

On January 23, 1985 A.M. Sunrise filed Interrogatories directed to the plaintiffs, and the plaintiffs were ordered to answer within thirty (30) days. On February 6, 1985 the plaintiffs filed a Request for

Extension of Time to respond to these Interrogatories. On March 1, 1985 the plaintiffs requested another extension of time to respond to these Interrogatories. The Court granted the plaintiffs until March 18, 1985 to answer these Interrogatories and stated that no further extensions of time would be granted. On March 18, 1985 the plaintiffs filed Answers to the Interrogatories propounded by A.M. Sunrise; the answers were evasive and non-responsive. On March 19, 1985 the Court ordered the plaintiffs to respond more specifically to five (5) Interrogatories propounded by A.M. Sunrise, and instructed the plaintiffs to file these answers not later than April 1, 1985, or to suffer dismissal with prejudice without further hearing.

On February 5, 1985, more than five (5) years after the litigation commenced, plaintiffs' counsel first contacted and attempted to retain an expert named Al Gouwens. Mr. Gouwens declined employment by plaintiffs' counsel in the Stout case, because he was already retained as an expert in a series of cases wherein he was the expert for the defendants, and Leonard Ring (plaintiffs' counsel in the Stout case) was plaintiffs' counsel in those various suits. On March 1, 1985 the plaintiffs requested production of documents from C&C Iron which their expert allegedly needed in order to form an opinion. On March 8, 1985 they retained another expert, named Ken Milbrandt. On March 20, 1985 the plaintiffs' counsel were advised by the attorney for C&C Iron that he had gathered the documents requested, and that the documents were available for inspection and photocopying by the plaintiffs' counsel. *Notwithstanding that the deposition of a structural engineer for Cole & Associates was set*

for March 28, 1985, plaintiffs' counsel made no effort to obtain those documents from C&C Iron. Notwithstanding that plaintiffs were under an Order to more specifically respond to Interrogatories propounded by A.M. Sunrise, one of which ostensibly required expert opinion to complete, the plaintiffs' counsel made no effort to take possession of the documents from C&C Iron, and again filed non-responsive answers to Interrogatories propounded by A.M. Sunrise. A hearing was held on April 2, 1985, and the Court determined that the Interrogatory Answers by A.M. Sunrise added nothing more than the original Answers, and that the Answers were not in compliance with the Court's Order. Accordingly, the trial court dismissed the Complaint as to A.M. Sunrise, leaving Biblich Elementary School as the only defendant.

The dismissal of A.M. Sunrise was the third time dismissal was imposed as a sanction for non-compliance with court orders.

Subsequently, three (3) hearings were held before the trial court in an endeavor by the plaintiffs to set aside the dismissal as to Cole & Associates and A.M. Sunrise. Arguments were made that documents were needed for experts to render opinions in order to answer the Interrogatories. *The Court specifically stated that this was true of only one Interrogatory pertaining to A.M. Sunrise, and that there was no excuse for the failure to respond to the others.* The Court declined to set aside the dismissal. The case was appealed by the plaintiffs to the Indiana Court of Appeals, which affirmed the trial court. The plaintiffs petitioned for a rehearing by the Court of Appeals of Indiana, which was denied. The plaintiffs

filed a Petition for Transfer to the Supreme Court of Indiana. The Supreme Court of Indiana directed the parties to file Briefs and to appear before the Court to argue the matter *de novo*. Subsequently, the Supreme Court of Indiana refused to grant transfer.

SUMMARY OF ARGUMENT

The plaintiffs' Complaint against A.M. Sunrise was dismissed a a *third* sanction for repeated failure to comply with discovery rules and orders. This dismissal was under the authority of Indiana Rules of Trial Procedure Number 37(B), which is similar to Federal Rule of Civil Procedure Number 37(b).

Under Indiana law, the choice of sanctions is discretionary. The trial court is authorized to make its determination of the appropriate sanction based upon its review of the entire record and the entire course of conduct of a party against whom sanctions are being sought. The Indiana Court of Appeals will not re-weigh the evidence for or against the sanction selected by the trial court. The only question on appeal is whether or not the trial court abused its discretion. An abuse of discretion under Indiana law is an exercise of discretion which is inconsistent with the logic and the facts.

The entire record in this case shows that the plaintiffs were dilatory throughout this litigation. They waited until the very last day for the statute of limitations to run before filing their suit, and thereafter, were repeatedly dilatory in compliance with discovery and Court Orders compelling discovery. In repeated instances they sought extensions of time to comply with discovery, and then failed to comply with dis-

covery orders. They did not seek an expert until almost five and one-half ($5^1/_2$) years after the commencement of the litigation and five (5) months before the discovery cut-off. They did not take possession of documents which they claimed their experts needed in order to form an opinion and to respond to discovery. In post-dismissal motions, the plaintiffs did not argue that documents were "hidden" or "justice obstructed," nor did they raise this issue in their first Appellate Brief. Only as they proceeded unsuccessfully through the various stages of appeal in the Indiana Courts did the plaintiffs refine their argument to develop a theory that documents were hidden and that justice was obstructed.

Now the plaintiffs contend that the dismissal violated their constitutional rights under the Fourteenth Amendment.

However, numerous decisions of the Supreme Court of the United States have established that the sanction of dismissal or default is appropriate under Federal Rule of Civil Procedure Number 37 or any comparable state statute, and that due process is not thereby violated. The Supreme Court of the United States has also held that it is immaterial whether the circumstances leading to the sanction of dismissal were the fault of the attorney or of the party himself.

There is no basis whatever for this case to be submitted to the Supreme Court of the United States, and the Petition for a Writ of Certiorari should be denied.

ARGUMENT

A review of the entire record in this case will readily disclose that the plaintiffs were guilty of repeated

violations of discovery deadlines and orders. Ultimately, with trial being a matter of about 3 months away, the trial court simply concluded that A.M. Sunrise was being deprived of its opportunity to prepare a defense as a result of the plaintiffs' dilatoriness and non-compliance with Court Orders.

In making a determination of appropriate sanctions, the trial court may consider the entire record of facts and circumstances surrounding the particular case. *Farinelli v. Campagna*, (1975), ___Ind.App. ___ , 338 N.E.2d 299.

The plaintiffs' strenuously argue that it was a violation of their rights of due process to dismiss their claim against Cole & Associates and A.M. Sunrise as a "first" sanction. They contend that a lesser sanction should have been employed. However, the record will disclose that the dismissal of Cole & Associates was the *second* time the sanction of dismissal had been employed, and that the dismissal of A.M. Sunrise represented the *third* time that the court granted dismissal as a sanction. The trial court could have well concluded that having dismissed the plaintiffs' claims against two defendants, lesser sanctions would not persuade the plaintiffs to comply with discovery orders.

The choice of the sanction for failure to comply with the discovery order is within the discretion of the trial court. *Breedlove v. Breedlove*, (1981), ___ Ind.App. ___ , 421 N.E.2d 739. The Court of Appeals of Indiana will interfere with the trial court's exercise of discretion only upon a showing that the trial court abused its discretion. *Justak v. Bochnowski*, (1979), ___ , 391 N.E.2d 872. The Court of Appeals may say that the trial court has abused its discretion only

when the result reached by the trial court is "clearly against the logic and effect of the facts and circumstances which are before the trial court" and the reasonable, probable, and actual deductions flowing therefrom. *Fulton v. Van Slyke*, (1983), ___Ind.App. ___, 447 N.E.2d 628.

A review of every one of the foregoing Indiana cases will show that in each of those cases, the conduct of the plaintiff was less egregious than the conduct of the plaintiffs in the present case. Dismissal of the plaintiffs' claim against A.M. Sunrise was well within the bounds of the controlling case law of Indiana. On Appellate review, the Court of Appeals of Indiana held that the trial court had not abused its discretion. The Supreme Court of Indiana, which heard oral argument on the allegations now presented to the Supreme Court of the United States, agreed.

The plaintiffs contend that their failure to respond to discovery by A.M. Sunrise was caused by their inability to obtain expert opinion. They also contend that the expert needed certain documents in order to form an opinion. *The plaintiffs had in fact retained their second expert, and had requested production of the documents in question from C&C Iron, but when the documents were made available by C&C Iron, the plaintiffs' counsel neglected to take possession of the documents.* Either the documents were not truly necessary, or the plaintiffs' counsel were guilty of neglect. Knowing that they were required to file true and complete amended answers to five (5) of A.M. Sunrise's Interrogatories not later than April 1, 1985,and knowing that they would be subject to dismissal without further hearing if they did not comply

with the Court's Order to do so, they nonetheless failed to obtain the documents and submit the documents to their expert.

In any event, the trial court stated that its reason for dismissing the Complaint against A.M. Sunrise was based upon the failure to answer four (4) Interrogatories, the answers to which did not require either expert opinion or documents.

The plaintiffs also contend, as they did before the Court of Appeals of Indiana and before the Supreme Court of Indiana, that since they had already submitted Joseph Stout to a deposition there was no need for them to respond to the Interrogatories, notwithstanding the Court Order. The deposition of Joseph Stout was given in 1981. The Interrogatories were filed in 1985, 46 months later. It would be reasonable to assume that the plaintiffs and their attorneys would have acquired additional information in the intervening time, and defense counsel would be derelict in failing to inquire as to whether or not any additional information had been obtained. In any event, it is not within the purview of a party to ignore a court order to comply with discovery, regardless of whether or not the party himself considers the discovery to be necessary. Once the court determines that the discovery is necessary, the party has no choice but to comply, or to suffer sanctions.

The plaintiffs now contend that the imposition of sanctions under Indiana Trial Rule 37 were violative of their Fourteenth Amendment due process rights. Federal Rule of Civil Procedure Number 37(b) is substantially similar to Indiana Rule of Trial Procedure Number 37(B). Both allow the imposition of sanctions,

including dismissal or default, for failure to comply with discovery orders.

In *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909), the Supreme Court of the United States addressed a case wherein a state trial court had stricken the answer of a defendant corporation which had failed to produce material evidence. The authority of the trial court to strike the answer was found in a state statute requiring corporations to produce documents and creating a presumption of fact as to bad faith and untruth of a defense in the event of suppression of material evidence. The Supreme Court held that the statute did not deny due process of law. The Supreme Court further held that the court's order striking the defense did not deny due process.

In *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), the plaintiff was requested to produce records which, by Swiss law, the plaintiff was prohibited from producing. The plaintiff made a good faith effort to comply with court orders concerning discovery, and indeed made production of 190,000 documents. However, because the production of some of the requested documents would have subjected the plaintiff to prosecution under Swiss law, the plaintiff did not produce those documents. As a result, the district court dismissed the Complaint under Rule 41(b), even though the court found that the plaintiff had attempted in good faith to produce the documents.

The Supreme Court held that dismissals for failure to comply with discovery orders were governed by Federal Rules of Civil Procedure Number 37(b), not by Federal Rules of Civil Procedure Number 41(b). The Court noted that the words "refusal" and "failure" to obey discovery orders have the same meaning.

and that under FRCP 37(b), a court could default a party for failure to comply with discovery consistent with the Due Process Clause of the Fourteenth Amendment, citing *Hammond Packing Company v. Arkansas*, supra.

In *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976), the Supreme Court of the United States held that a District Court did not abuse its discretion in resorting to the extreme sanction of dismissing the respondent's anti-trust action against the petitioners pursuant to FRCP 37, where the Court found that notwithstanding its admonitions and numerous extensions of time, the respondents failed to respond to written Interrogatories as ordered by the court.

The Supreme Court of the United States stated:

> The question of course is not whether this Court or whether the Court of Appeals would as an original matter have dismissed the action. *It is whether the District Court abused its discretion in so doing.*
> But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent . . . (*Id.* at 642,643) (emphasis added)

In another case, the Supreme Court upheld the use of FRCP 37(b) to foreclose a jurisdictional defense. In that case, the defendants had pleaded lack of ju-

risdiction over the person. The plaintiff submitted discovery to the defendants in order to try to establish facts to show whether or not jurisdiction indeed existed. The defendants failed to comply with discovery orders. Under the authority granted by FRCP 37(b), the District Court held that jurisdiction was established. *Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982). In that case, the Supreme Court made the following comments:

> The expression of legal rights is often subject to certain procedural rules. The failure to follow those rules may well result in a curtailment of the rights.
>
> . . . .
>
> Rule 37(b)(2)(A) itself embodies the standard established in *Hammond Packing Company v. Arkansas*, 212 U.S. 322 (1909), for the due process limits on such rules. There the court held that it did not violate due process for a state court to strike the answers and render a default judgment against a defendant who failed to comply with a pre-trial discovery order. Such a rule was permissible as an expression of the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered. . . .
>
> . . . .
>
> Due process is violated only if the behavior of the defendant will not support the *Hammond Packing* presumption. A proper appli-

> cation of Rule 37(b)(2) will, as a matter of law, support such a presumption. See *Societe Internationale v. Rogers*, 357 U.S. 197, 209-213 (1958). *Id.* at 705,706.

The plaintiffs contend that their responses to discovery were "clumsy", but that they were not "contumacious" and that the trial court never found "bad faith". Under Indiana law, construing Indiana Rule of Trial Procedure Number 37(B), conduct can constitute "bad faith" within the meaning of Rule 37(B) even if it falls short of being deliberate or by design. *Hepp v. Pierce*, (1984), ___Ind.App. ___ , 460 N.E.2d 186. Furthermore, where the dismissal is based upon violation of a court order, the trial court need not find bad faith to justify dismissal. *Noble v. Moistner*, (1979), ___Ind.App. ___ , 388 N.E.2d 620. Where the dismissal is for failure to comply with discovery orders, Indiana law holds that the finding of bad faith is *implicit*. *Breedlove v. Breedlove*, (1981), ___Ind.pp. ___ , 421 N.E.2d 739.

The plaintiffs contend that they should not be penalized for the negligence of their counsel. However, the Supreme Court of the United States has held otherwise. *Link v. Wabash Railroad*, 370 U.S. 626 (1962). There, the Supreme Court stated:

> There is certainly no merit in the contention that the dismissal of the petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. . . . *Id.* at page 633.

In a footnote to that case, the Court made the wry observation that "keeping this suit alive merely because the plaintiff should not be penalized for the

omissions of his own attorney would be visiting the sins of the plaintiff's lawyer upon the defendant". (Footnote 10).

CONCLUSION

The entire record in this case justifies the imposition of the sanction of the dismissal of the plaintiffs' Complaint against A.M. Sunrise for repeated noncompliance with or outright violation of discovery orders. The plaintiffs were repeatedly warned that no further extensions of time would be granted, and repeatedly advised that failure to comply would result in the sanction of dismissal. Notwithstanding this, they failed to comply with court orders concerning discovery.

The dismissal of their claim against A.M. Sunrise was based on Interrogatories which did not require either expert opinion or documentation to answer.

The dismissal under Indiana Rule of Trial Procedure Number 37(B) and Indiana case law construing that rule is entirely consistent with decisions of the Supreme Court of the United States, which have held that where the sanction is appropriately applied, due process is not violated.

The Petitioners have shown no reason why their Petition for a Writ of Certiorari should be granted. The defendant, A.M. Sunrise Construction Company, Inc., respectfully prays that the Petition be denied.

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